No. -93-

93-449

In The

# Supreme Court Of The United States

Supreme Court, U.S.
FILED
SEP 20 1993
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OCTOBER TERM, 1993

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PHILEMON K. PLATT,

*Petitioner,*

v.

JUDITH IHLE; LINDA IHLE;
FEDERAL AVIATION ADMINISTRATION, et al.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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PUBLISHER'S NOTE:

The following page is unavailable for filming:

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## QUESTIONS PRESENTED

I. DID THE TRIAL DECIDE CORRECTLY, AND DID THE FOURTH CIRCUIT COURT OF APPEALS AFFIRM SAID DECISION CORRECTLY, THAT PLAINTIFF FAILED TO STATE A CAUSE OF ACTION UNDER THE DOCTRINE OF *BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS,* 403 U.S. 388 (1971) ?

II. ASSUMING THE ANSWER TO THE PREVIOUS ISSUE IS IN THE NEGATIVE, IS IT PROPER TO MAINTAIN SUCH A *BIVENS* ACTION AGAINST PRIVATE PERSONS WHO WORK IN CONCERT WITH GOVERNMENT EMPLOYEES TO DEPRIVE A CITIZEN OF HIS CONSTITUTIONAL RIGHTS AS IS HELD BY MOST, BUT NOT ALL OF THE CIRCUIT COURTS WHICH HAVE DECIDED THE ISSUE ?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

Philemon K. Platt, Petitioner

VS.

Judith Ihle; Linda Ihle;
Federal Aviation Administration, *et al.*

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ON PETITION FOR WRIT OF CERTIORARI
From the United States Court of Appeals
for the Fourth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Philemon K. Platt, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on June 22, 1993.

## Opinions Below

The Order of the United States District Court for the Eastern District of North Carolina denying plaintiff's motion for reconsideration of the court's previous order allowing the defendants, Linda Ihle's and Judith Ihle's motion to dismiss, denying the plaintiff's motion to amend the complaint against the Ihles, granting the Ihles motion for sanctions and the F.A.A. employees' motions to dismiss and declaring that (1) an action under the doctrine enunciated by this Honorable Court in *BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS*, 403 U.S. 388 (1971) does not apply to private citizens acting in concert with federal officials, as such private citizens, acting in their private capacities, cannot be guilty of violating due process rights, and (2) that the Amended Complaint fails to allege with specificity any violation of Plaintiff's constitutional rights

is printed in Appendix A hereto, *infra*, pp. 42- 54. The unpublished *per curium* opinion of the United States Court of Appeals for the Fourth Circuit on June 22, 1993 affirming the District Court's Opinion in all aspects, and is printed in Appendix A hereto, *infra*, pp. 55- 85.

**Jurisdiction**

The United States Court of Appeals for the Fourth Circuit rendered its opinion (*infra*, page 42) on June 22, 1993. The jurisdiction of the Court is invoked pursuant to United States Code Title 28, § 1257(1).

The jurisdiction of this Court is invoked on the ground that the District Court has taken the position that private citizens who act in concert with and conspire with federal employees to deprive other citizens of the constitutionally guaranteed rights can not be held liable.

## Statutes and Constitutional

## Provisions Involved

United States Constitutional Amendment V:

AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Statement of the Case

- Procedural History:

On March 8, 1991 the plaintiff filed a *pro se* complaint alleging a violation of his civil rights and seeking monetary and injunctive relief. The complaint

was filed in the United States District Court for the Eastern District of North Carolina. *Pro se* motions to dismiss were filed by the two non-federally employed defendants, Judith and Linda Ihle on April 1, 1991 and April 5, 1991, respectively. The two Motions to Dismiss were granted by Judge Terrence W. Boyle on May 6, 1991. Each Ihle filed a motion for sanctions on May 10, 1991. Plaintiff, through counsel, filed a motion to amend his complaint and a motion to reconsider the dismissal of the Ihles. On July 17, 1991 the three individually named federal employees filed their motion to dismiss. Judge Boyle entered his order on September 17, 1991 denying plaintiff's motion to reconsider, granting dismissal to all defendants and allowing sanctions against plaintiff. Judge Boyle held that private citizens, even if working in concert with and in conspiracy with federal employees can not by definition be liable for deprivation of a third party's

constitutional rights. Furthermore, Judge Boyle found that the Amended Complaint did not articulate with specificity any violation of his constitutional rights.

A notice of appeal to the United States Court of Appeals for the Fourth Circuit was filed by plaintiff on September 19, 1991. Argument in Richmond was held on March 2, 1992. The appellate court decided the case on June 22, 1993, affirming the trial court's order. The Fourth Circuit's opinion, unpublished and *per curium*, did not address the issue of private citizens and *Bivens, supra*, but rather by totally relying on facts found no where else other than in the appellate court's opinion, the court found that the Ihle's did nothing more than pass on information to a federal agency for which no cause of action lies, and that the *Bivens action* is precluded by this Court's holding in *Siegert v. Gilley*, 59 U.S.L.W. 4465, 111 S. Ct. 1789 (1991). Thus no causes of action against any Defendants

survived the Fourth Circuit's decision.

- Statement of Facts:

The following pertinent facts were alleged in the Amended Complaint:

Plaintiff, a vastly experienced airplane pilot and charter operator was involved in litigation against the F.A.A. office in Baltimore, Maryland in 1981. That case was settled between the parties.

In October of 1989, plaintiff was hired by Air East, Inc., as its chief pilot and check airman. The defendant, Bishop Reynold, an F.A.A. employee, told the owner of Air East that because plaintiff had "given the Baltimore office a hard time" he would never approve plaintiff as check airman or chief pilot and that Air East would never obtain the F.A.A.'s approval to operate. Lastly the owner of Air East was told by Mr. Bishop that plaintiff was the subject of a then ongoing F.A.A. investigation. The night

before plaintiff was to begin his job, he was fired.

In March of 1989 the same Reynold Bishop filed a report with the F.A.A. alleging that he had done a base inspection of plaintiff's charter operation. In fact, no such inspection had ever been done.

Judith Ihle and her daughter, Linda Ihle, filed several complaints against plaintiff with the F.A.A. The Defendant Gavin, another F.A.A. employee wrote a document which purported to be an interview with a Mrs. Elizabeth Howard. The document was allegedly witnessed by the defendant Judith Ihle, and signed at the bottom by Inspectors Gavin and Scarfeo, the last of the F.A.A. employee defendants. The reality, according to Mrs. Howard, was that she was never interviewed by the F.A.A. employees, and that while she signed the document, she was tricked into signing the prepared "interview sheet" by Judith Ihle whom she considered her

fried theretofore.

**Reasons for Granting This Writ**

The Fourth Circuit's opinion is based on facts found in the opinion and nowhere else.

The amended complaint found in Appendix A, *infra* at p.1 essentially outlines four material events which gave rise to this litigation. The first was the abusive exercise of the F.A.A.'s vast power by Defendant Bishop to intimidate the owner of Air East into firing plaintiff from gainful employment. The second was the filing of at least one false report in the records of the F.A.A. by Defendant Bishop. The third was the filing of false reports about plaintiff with the F.A.A. by the Ihles. The fourth and perhaps the most serious allegation is the collaboration between Judith Ihle and the F.A.A. employees Scarfeo and Glavin in creating the fraudulently written and utilized statement of interview from Mrs.

Elizabeth Howard.

In the appellate court's opinion (*infra* Appendix A p.60), it is stated that "Bishop gave them (referring to Air East) the impression that Platt was not a competent airman..." This "fact" can be found no where in the record, and certainly not in the amended complaint. Thus, the court has created a defamatory statement so that its ultimate holding that this claim is barred by the holding in *Siegert v. Gilley*, 59 U.S.L.W. 4465, 111 S. Ct. 1789 (1991) which held that a pure defamation is not actionable under *Bivens*.

Of course, plaintiff never suggested otherwise. In its sixth footnote, *infra* Appendix A, p.72, the court ironically suggests that the undersigned counsel "insisted" that Bishop's statements were not defamatory in an attempt to avoid the holding in the *Siegert* case. The truth of the matter is that there never were any defamatory

statements made by Bishop. He stated that plaintiff had given the Baltimore office a hard time. Indeed, ten years before, he had. Bishop further told the owner of Air East that he would not approve plaintiff as either check airman or chief pilot. Again, he wasn't lying or mistaken. It is certain that he would not have approved plaintiff for anything. It is equally clear that he was not fabricating when he advised Air East that the company would never get the permits it required from the F.A.A. if plaintiff were the chief pilot and check airman. Lastly the owner of Air East was told by Bishop that plaintiff was the subject of a then ongoing F.A.A. investigation. While it is illegal to divulge who is and is not the subject of governmental investigation, the statement was not false. To the contrary, the statement was all too true. If you remove the appellate court's creation of "incompetence" there simply was nothing about which Bishop did that

could be addressed by a state brought action for defamation.

To the contrary, what Reynold, and in fact all of the defendants in this case did, is wield the immense power that the F.A.A. has over citizens involved in aviation in an intentional, illegal manner in order to exact retribution on plaintiff for his perfectly legal behavior a decade before. There is no state or federal remedy available to plaintiff without allowing him to bring an action against the federal agents for deprivation of his constitutional rights under the *Bivens* doctrine.

Assuming that the federal employees committed acts, which if proven are actionable under *Bivens*, then the remaining question is what about the Ihles, the non-federally employed private citizens. Once again the authors of the Fourth Circuit opinion changed the facts to fit the holding. The Court's conclusion was that plaintiff

is alleging only that the two Ihles reported information to the F.A.A. and they can not be held responsible for what the government does with such information. However that is not what plaintiff alleged in his amended complaint. The Ihles, for one reason or another, got involved in a conspiracy with F.A.A. agents and partook in the setting up of plaintiff so that the F.A.A. could attempt to strip plaintiff of his licenses. Secondly, Judith Ihle tricked her one time friend, Elizabeth Howard into signing what purported to be a statement of interview ostensibly taken by two F.A.A. employees and witnessed by Judith Ihle. The octogenarian, Mrs. Howard, has repudiated the statement, and alleged that Judith Ihle got her to sign the statement under false pretenses and that she was never interviewed by agents or representatives of the F.A.A. Assuming the truth of the allegations, it is difficult to understand how the trial court and appellate court could

hold that Plaintiff's grievances as they relates to the Ihles are frivolous - justifying Rule 11 sanctions.

The trial court went as far as holding that in any event, *Bivens* does not allow suit against non-governmental employees. Relying on *Canadian Transport Co. V. United States*, 663 F.2d 1081 (D.C. Cir. 1980) Judge Boyle said that "*Canadian Transport* actually held that 'private citizens, acting in their private capacities, cannot be guilty of violating due process rights. The Fifth Amendment is a restraint on the federal government, not on private citizens.' *Id.* at 1093. As in *Canadian Transport*, the Ihles were acting in their private capacities not as government agents." (*infra* Appendix A p.50).

The theory that most of the circuits have utilized to allow the inclusion of private citizens who work in concert with federal officials as defendants in a *Bivens* type action is that when civilians act in concert with federal agents for

federal purposes they are, in effect, federal agents, and can be held liable for a deprivation of Constitutional rights. This Court has never considered whether a *Bivens* type action may be brought against a private party. See *Morast v. Lance*, 807 F.2d 926, 930 n.5 (11th Cir. 1987). However four circuits have held that a *Bivens* action is permitted against private citizens provided that the private party had acted under color of federal law. See *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982); *Yiamouyiannis v. Chemical Abstract Service*, 521 F.2d 1392, 1393 (6th Cir. 1975); *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984). Moreover, three other circuits strongly suggest that they would also allow such actions. See *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987); *McNally v. Pulitzer Publishing Company*, 532 F.2d 69, 75-76 (8th Cir. 1976); and

*Holodnak v. AVCO Corp.*, 514 F.2d 285 (2nd Cir. 1975), *cert. denied* 423 U.S. 892 (1976).

The only Court of Appeals which has taken an adverse position is the First Circuit which has stated that it would not allow a cause of action against private parties acting under the color of federal law. See *Fletcher v. Rhode Island Hospital Trust Bank*, 496 F.2d 927 (1st Cir. 1974). Interestingly, the *dicta* is contained in a footnote without any supporting rationale.

The appellate court decision of which plaintiff is presently seeking review does not address the issue as it remarkably found that there were no allegations of any specificity in the Complaint that would suggest that the Ihles worked in concert with federal officials to deprive plaintiff of his rights.

Such narrowly construing facts against a *Bivens* type plaintiff, coupled with allowing such a

misinterpretation of *Siegert* to stand can only have a chilling effect on citizen's who have in fact been the victims of federal governmental abuse. Similarly, if the lower courts' ruling were to stand, it would send a dangerously encouraging message to federal officials who work in regulatory agencies.

**Conclusion**

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Counsel of Record

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing

Petition for Writ of Certiorari was mailed postage pre-paid, on the 20th day of September, 1993, to Steven E. Lacy, Esq., P.O. Box 1095, New Bern, North Carolina 28563, and Linda Kaye Teal, Assistant United States Attorney, Civil Division, P.O. Box 26897, Raleigh North Carolina 27611.

Charles B. Zuravin

# APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

PHILEMON K. PLATT

Plaintiff

V.

CIVIL ACTION NO. 91-12-CIV-2-BO
JUDITH IHLE, ET AL.

Defendant

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**AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

Philemon K. Platt, by his attorneys, Charles B. Zuravin of Charles B. Zuravin, P.A. and Gary Clemmons of Stubbs, Perdue, Chesnutt, Wheeler & Clemmons, sues Judith Ihle, Linda Ihle, the Federal Aviation Administration, Reynold Bishop, individually and as an employee of the Federal Aviation Administration, Edward F. Glavin, individually and as

an employee of the Federal Aviation Administration and Dennis Scarfeo, individually and as an employee of the Federal Aviation Administration pursuant to the separate counts enumerated hereinafter and alleges:

**JURISDICTION**

1. This Court has jurisdiction to try this case under the provisions of 28 U.S.C. §1331 to decide federal and constitutional questions raised hereunder.

**VENUE**

2. Venue in this case is properly before the United States District Court for the Eastern District of North Carolina under the provisions of 28 U.S.C. §1402.

## PARTIES

3. Plaintiff, Philemon K. Platt (Platt) is an individual, residing in Ocracoke, North Carolina. He operates a business under the name of Pamlico Air Service, formerly Calypso Airways.

4. The Defendant, Judith Ihle (J. Ihle), is a retired airline attendant who resides in Ocracoke, North Carolina.

5. The Defendant, Linda Ihle (L. Ihle), is a woman who operates a beauty parlor on Ocracoke Island. Linda Ihle is the daughter of the Defendant J. Ihle.

6. The Federal Aviation Administration (F.A.A.) is an executive Federal agency authorized by statute to administer those laws pertaining to the aviation community to assure the safety of that community and the public at large.

7. The Defendants Reynold Bishop (Bishop), Edward F. Glavin (Glavin) and Dennis Scarfeo (Scarfeo), are employees of the F.A.A. located at the Winston-Salem, North Carolina Flight Standards District Office (FSDO).

## STATEMENT OF FACTS

8. Plaintiff is an experienced, professional pilot[1], teacher of pilots, aeronautical engineer[2], former air taxi/charter[3] operator and all around

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[1] To receive a private pilot's license, one requires 40 hours of flight time. The Plaintiff has in excess of seventeen thousand hours.

[2] In 1961, Plaintiff graduated from the University of Maryland with a degree in Aeronautical engineering.

[3] Air taxi/charter refers to businessmen who fly passengers for financial remuneration.

expert[4] in general aviation[5].

Plaintiff has been involved with aviation since 1966 when he obtained his private pilots license. By 1976, he had obtained just about every possible type of license and rating given by the F.A.A. to airmen.[6]

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[4] Indeed, Plaintiff has testified at trials dealing with aircraft accidents and alleged violations, as an expert witness and on more than one occasion was consulted by the Federal Aviation Administration as an expert in accident investigations.

[5] As that term is used by those familiar with the wonderfully complex world of aviation, "general aviation refers to all aspects dealing with flying other than scheduled carriers.

[6] Plaintiff holds a private pilots license, a commercial pilot's license, he is instrument rated, and qualified to fly multi-engine aircraft, he is a certified flight instructor (CFI), a certified instrument flight instructor (CFII), a multi-engine instructor and a multi-engine instrument instructor, he is qualified to fly and teach the flying of sea planes. He has qualified to be, and in fact acted as a CFI and CFII revalidator for the F.A.A., he was also used by the F.A.A. as a safety counselor. He has run numerous clinics regarding flying and airplane safety.

9. In 1977 Plaintiff started Calypso Airways (Calypso), an air charter operation certified under Part 135 of the Federal Aviation Regulations (F.A.R.s). It was the starting of the small F.B.O.[7] fourteen years ago which triggered the series of events culminating in this litigation.

10. Calypso was situated in Easton Airport, a relatively small airport owned and operated by the town of Easton, Maryland located on the State's Eastern Shore in the middle of the Delmarva Peninsula.

11. For reasons never made entirely clear, the

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[7]Fixed Base Operator or Operation which refers to a business which provides services to pilots at a particular airport in the manner of coffee, refreshments, fuel and aircraft maintenance, a place to relax, etc.

then Chief of the Baltimore General Aviation District Office (GADO), now known as FSDO's throughout the F.A.A., began a series of harassing and intimidating actions against the Plaintiff and his new business, Calypso. The Baltimore GADO was responsible for operations in Easton, Maryland, and it was on that office that the Plaintiff had to depend for approval and governmental cooperation in order to run Calypso legally and successfully.

12. When Plaintiff was unable to prevent the Baltimore GADO, and several individual employees who worked there, to cease their discrimination against his business and cease harassment of Plaintiff personally, his employees and his customers, Plaintiff filed suit against the F.A.A. and several Baltimore employees in the United States District Court for the District of Maryland in 1981.

13. The suit was never tried, but settled informally. Among the terms of settlement were:

A. The F.A.A. paid over to Platt, and Calypso, the sum of $18,500.

B. All alleged violations against Plaintiff and/or Calypso were rescinded/canceled.

C. The F.A.A. and all of its employees would immediately cease and desist from harassing Plaintiff, his employees and customers.

D. Kenneth Kress was removed from authority over the Easton Airport and operations which took place there until Platt himself approved of Kress' return.

E. Several F.A.A. employees were disciplined.

14. For the most part, the F.A.A. lived up to its end of the bargain. There were, however, a few exceptions.

15. In 1982, an F.A.A. employee by the name of George Bush (no relationship we presume) looked at the log book belonging to one of Plaintiff's students. Mr. Bush discovered that rather than signing each entry on a page individually, Plaintiff would write in the required information on each line and sign once at the top and indicate that he wrote the balance of the lines by extending a line from his name down the page. Technically, the F.A.R. dealing with instructor signatures requires instructors to sign each and every entry on each page of the log book. For this incredibly technical violation of the F.A.R.s, a supposedly improper method of signing a log book, Mr. Bush proposed that Plaintiff be assessed a fine of three thousand ($3,000.00) dollars. The charge was ultimately dropped, but not until Plaintiff suffered great stress, humiliation,

embarrassment and much pain and suffering. At that point in time, and in fact until this date, Plaintiff's record has been, for the most part, pristine.[8]

16. In 1984, the Baltimore GADO began to illegally investigate an alleged violation dealing with a flight which occurred over 15 months before the investigation was to commence. The law allows the F.A.A. only six months to investigate and take action. The investigation was dropped, but not before causing the Plaintiff great pain and suffering.

17. In 1986, Plaintiff purchased property in

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[8] Plaintiff has never been violated, disciplined, counseled or in any other manner had less than a perfect record with the F.A.A. except for one minor incident wherein a private citizen alleged that Plaintiff had violated one of the F.A.R.s. The matter was settled between the F.A.A. and Plaintiff without the necessity of any official sanction. The incident occurred nearly 20 years ago.

Ocracoke, North Carolina and began building a home on the island for himself and his wife.

18. In 1988, Plaintiff terminated his business activities in Easton, Maryland and completed his move to North Carolina.

19. Plaintiff changed the name of his proprietorship from Calypso Airways to Pamlico Air Services (Pamlico) and changed the address of Pamlico to that of his home in Ocracoke. The Ocracoke airport is owned and operated by the United States Park Service and does not allow any commercial operations to be based on the field.

**RECENT FACTUAL DEVELOPMENT**

20. On or about March 15, 1989, Plaintiff was at the Ocracoke Airport with his son, Kenneth, and one his son's friends for most of the day. While at the airport, the threesome observed a single

engine Beechcraft airplane land at the airport, taxi to several planes and appear to write down the N numbers of each.[9] The operator of the airplane never turned his engine off, never deplaned and never made any attempt to talk to anyone - either at the airport or by using the pay telephone which was, at that time, located on the field and in clear view of said airplane.

21. On or about March 25, 1989, Plaintiff received a letter dated March 23, 1989, from the Baltimore FSDO still responsible for the operation of Calypso/Pamlico as Plaintiff had not yet officially

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[9] Each plane flown in the United States must be identified by a unique set of numbers and letters which are clearly marked on the given plane's tail in accordance with the F.A.R.'s. Planes registered in the United States are all identified by a series of numbers and/or letters the first of which is "N". Accordingly, the identifier is often referred to as either a tail number or an N number.

changed the address on his certificate allowing operation of air taxi company under the provisions of Part 135 of the F.A.R.s. The letter advised Plaintiff that an F.A.A. employee, the Defendant Reynold Bishop, had attempted to do a "Base inspection" of Pamlico's base of operations. Bishop filed a false report indicating that no one was at the airport, that there was no telephone at the airport, that he was unable to find Plaintiff on Ocracoke Island at all, and that he was unable to do a "Base inspection." Bishop made no effort whatsoever, to locate Plaintiff on the Island at his home or at the airport. Bishop filed the report with the intent to create the impression that he had attempted to do a "Base inspection" and that Plaintiff had no operation nor was Plaintiff available to show his business to the F.A.A.

22. Plaintiff, not wanting to get into any kind of antagonistic relationship with the F.A.A. in North Carolina, wrote back to the Baltimore FSDO and addressed the concerns expressed in the letter of March 23. By the same correspondence, Plaintiff returned his 135 certificate (the license which allows a businessman to operate an air taxi/charter operation) indicating that he would apply for his new certificate from the North Carolina FSDO in Winston-Salem which would indicate the correct address of Pamlico Air Services.

23. Plaintiff was finally settled enough in Ocracoke to commence operating Pamlico for air taxi and chartering services. Therefore, by letter dated May 20, 1989, Plaintiff requested his new 135 certificate from the Winston Salem FSDO. It was not until Plaintiff filed a complaint with the

Administrator of the F.A.A., on July 31, 1990, the agency began in earnest to process the certificate. Plaintiff was unable to operate his air taxi/charter business for over a year, at great loss and expense.

24. In the second week of October of 1989, Plaintiff was hired by Air East, a small airline and F.B.O., operating out of Craven County Regional Airport in New Bern, North Carolina, as Chief Pilot and check airman.[10]

25. Air East had been having trouble getting certain approvals so that they could operate as they wished. Plaintiff, having run a similar business, was in a position to aid and assist Air East to obtain the

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[10] As check airman, Plaintiff was to keep other pilot's working for Air East current and up to par in their flying skills. It would have been Plaintiff's job, as check airman, to give the other pilot's check rides, on a regular six month basis as required by the F.A.R.s.

necessary F.A.A. approvals required to operate. When one of the owners of Air East advised Bishop that he had hired Plaintiff as chief pilot and check airman, Bishop's response was to the effect that he (Bishop) and the F.A.A. would never give Phil Platt the necessary authorization needed by a chief pilot or check airman. Bishop mentioned that Plaintiff "had given the Baltimore office a hard time" and that Plaintiff was the subject of an ongoing F.A.A. investigation. The latter disclosure was a clear violation of 18 U.S.C. §1905 and 49 U.S.C. Appx. §1472 (f), two criminal statutes.

26. Air East fired Plaintiff on the night before he was to start his job.

27. On September 25, 1990, based upon two absolutely trivial and false allegations made by the Defendants L. Ihle and J. Ihle, the F.A.A. issued an

Emergency Order of Revocation signed by William G. Nelmes, attorney for the Office of the Assistant Chief Counsel of the F.A.A. located in Atlanta, Georgia. The Order stripped Plaintiff of all pilot certificates possessed by him immediately upon receipt of the document in the mail. This total loss of the right to fly and/or earn a living in aviation was, understandably, devastating to Plaintiff.

28. By letter dated September 28, 1989, signed by Richard Lewis Faber, Esq., Senior Enforcement Attorney for the Office of Assistant Chief Counsel, Plaintiff was advised that (1) the Emergency Order of September 25 had been canceled, and (2) that Plaintiff was legally able to exercise all rights granted under his licenses. Also enclosed with the letter was a Notice of Proposed Certificate Action proposing to revoke all of

Plaintiff's licenses on a non-emergent basis.

29. On January 31, an informal meeting was held at the offices of the Assistant Chief Counsel in Atlanta, Georgia.

30. On February 5, 1991, the F.A.A. issued an Order of Revocation depriving Plaintiff of his pilot's licenses. The Order is presently being appealed before the National Transportation Safety Board in a proceeding styled as F.A.A. vs Platt, SE 11-708.

31. Both allegations upon which the F.A.A. is relying to issue the Order of Revocation, were brought by J. Ihle and L. Ihle, respectively.

32. The first supposed event was an alleged Charter flight whereby Plaintiff flew an official of Hyde County, North Carolina from Swan Quarter, North Carolina to Ocracoke. The F.A.A. received a

report from the Defendant Linda Ihle by which she claims to have "chartered" the flight in question. Ms. Ihle's motives for the fabrication are unknown, however, Mr. Platt supplied evidence to the F.A.A. that he had an arrangement with the County by which he would lease his airplane(s) to them to help their officials get around the county faster than would otherwise be possible. The flight was in accordance with the agreement. At the time, L. Ihle offered to pay for the flight and Mr. Platt explained that she need not as the County would pay for the flight pursuant to his agreement with the County. L. Ihle insisted on paying. Plaintiff accepted L. Ihle's check for the proper amount for the lease of an airplane - far less than a charter flight would have cost.

33. Notwithstanding the evidence of the

arrangement which existed between the Plaintiff and Hyde County, the F.A.A. relied, and continues to rely, on L. Ihle's bald, unsubstantiated allegation, that she "chartered" a flight from Plaintiff, to pursue its February 5, 1991, Order of Revocation.

34. The second alleged violation dealt with a flight which took place on May 10, 1989, by which Plaintiff flew Mrs. Elizabeth O. Howard from Ocracoke Island to New Bern and back. The reality of the situation was that Ms. Howard asked Plaintiff to fly her to New Bern for a sum of money. Plaintiff explained to Mrs. Howard that he did not possess a valid license to perform charter flights for remuneration. However, he explained that she could lease his airplane for a nominal amount of money and have any pilot fly it for her. Mrs. Howard asked Plaintiff to do her a favor and pilot the airplane.

Plaintiff agreed to help Ms. Howard, a septuagenarian, even though he could not be paid for his time flying or waiting for Ms. Howard to finish her business in New Bern.

35. In its exuberance to "get" Plaintiff and pay him his retribution, the F.A.A., in the form of Defendant Glavin, wrote up a supposed "Interview" with Mrs. Howard which seemingly recounted what Mrs. Howard told the interviewers, the Defendants Glavin and Scarfeo, on June 21, 1990 at 10:30 a.m. The interview reflected that Mrs. Howard took an "air charter" flight for one hundred ($100.00) dollars. The "interview" statement was witnessed by J. Ihle and signed at the bottom by Scarfeo and Glavin as F.A.A. Inspectors.

36. What really occurred that day was that the Defendant J. Ihle came to visit Mrs. Howard's

home and asked her to sign the pre-prepared "Interview" statement. No one from the F.A.A. was present that day, or any other day, according to Ms. Howard. She was not told what the meaning of the word "charter" was and has clearly stated in later affidavits that she knew that she was simply renting an airplane and Plaintiff was doing her a favor when he acted as pilot. The "interview" was created by the F.A.A. Inspectors, Scarfeo and Glavin, handwritten by Glavin and, in complicity and conspiracy with J. Ihle, Ms. Howard was tricked into signing the created evidence.

37. The two alleged violations were simply the result of malice, hate and contempt which the two Defendants, J. Ihle and her daughter L. Ihle, hold the Plaintiff; a contempt which is apparently shared by the vindictive F.A.A. inspectors. All of

these actions went on and continue to go on notwithstanding numerous protests the Plaintiff has made to F.A.A. officials.

**COUNT I**

42 U.S.C. §1985(3)

Plaintiff, Philemon K. Platt, sues J. Ihle, L. Ihle, individually, Glavin, Scarfeo and Bishop, in their individual and official capacity, and the F.A.A., and alleges:

38. The factual allegations contained in paragraphs 1 through and including 37 are incorporated herein by reference as if fully restated herein.

39. This Count is a claim for legal and equitable remedies to redress the deprivation of rights secured to Plaintiff by the Civil Rights Act of 1871, 42 U.S.C. §1985(3), arising out of a

conspiracy by Defendants to deprive Plaintiff of his right to make and enforce contracts, the equal protection of the laws and the right to due process as are guaranteed to all citizens of the United States under the United States Constitution.

40. The Defendants joined together to act in concert to deprive Plaintiff of his basic right to earn a living in his chosen field.

41. Reynold Bishop, acting outside of the scope of his employment, and also on behalf of the F.A.A., filed a false report of an "operation base check" which he did not even attempt to do on March 15, 1989 or on any other day. He further threatened the owner of Air East that he would never authorize Plaintiff as a chief pilot or a check airman. During the same investigation he unlawfully disclosed that Plaintiff was the object of an F.A.A.

investigation in violation of 18 U.S.C. §1905 and 49 U.S.C. Appx. §1472 (f).

42. Inspector Glavin handwrote a document containing false statements which purported to be an interview statement of Mrs. E. Howard. He then had his co-conspirator, J. Ihle, trick Mrs. Howard into signing the document. Inspectors Glavin and Scarfeo then signed the document creating the impression that they had interviewed Mrs. Howard.

43. J. Ihle complained to the F.A.A. of illegal operations at the Ocracoke Airport by Plaintiff when he was conducting no operations at the airport whatsoever - legal or otherwise. J. Ihle encouraged a friend and her friend's daughter to complain to the F.A.A. about a supposed charter flight that Plaintiff never undertook simply to attempt to cause Plaintiff

problems with the F.A.A. Lastly, she took part in the conspiracy to create the false affidavit of Mrs. Howard. All of her actions were aimed at a concerted effort with the other Defendants to destroy Plaintiff and put him out of business.

44. L. Ihle, not coincidentally asked Plaintiff to fly a Hyde County Inspector to Ocracoke for her. L. Ihle did not realize that Plaintiff had an arrangement with Hyde County to lease its airplanes whenever its officials desired to come to Ocracoke. When Plaintiff flew the inspector to and from Ocracoke, acting only as the pilot of the leased airplane, he was going to charge the County for the aircraft rental. L. Ihle insisted on paying him, using her own funds. It was explained to her by Plaintiff that it was not necessary for her to pay anything as the County would pay the bill for airplane rental. L.

Ihle insisted on using her own funds. Plaintiff thought it strange but allowed her to pay by check. All of L. Ihle's actions were simply to try to "setup" Plaintiff to make it appear as if were in the charter business without proper F.A.A. approval. Her actions were aimed at a concerted effort, with the other Defendants, to destroy Plaintiff and put him out of business.

**WHEREFORE,** Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits or employment including sick leave, vacation leave and others, plus attorney's fees incurred in pursuing this case, as well as for defending F.A.A. v Platt before the N.T.S.B., SE 11-708, in the amount of $500,000.00;

B. For compensatory damages for losses

resulting from humiliation, mental anguish and damage to Plaintiff's name, professional reputation and standing, in the amount of $500,000.00;

C. For pre-judgment interest on the amount of lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of $5,000,000.00;

E. That the F.A.A. expunge all negative and derogatory comments or references in any official government files relative to any and all of the facts complained of herein;

F. For costs of this suit, including reasonable attorney's fees;

G. For such other and further relief as the Court may deem proper.

## COUNT II

### 42 U.S.C. §1986

Plaintiff, Philemon K. Platt, sues the unnamed directors and supervisors of the Defendants, Scarfeo, Glavin and Bishop, in their personal and official capacities, and the F.A.A., and alleges;

45. The factual allegations contained in paragraphs 1 through and including 44 are incorporated herein by reference as if fully restated herein.

46. This Count is for legal and equitable remedies to redress the deprivation of rights secured to Plaintiff by the Civil Rights Act of 1871, 42 U.S.C. §1986, arising out of a conspiracy by the Defendants to deprive Plaintiff of his right to make and enforce contracts, the equal protection of the

laws and the right to due process as are guaranteed to all citizens of the United States under the United States Constitution.

47. At all times relevant herein, the F.A.A., its executive staff and the unnamed supervisors of the F.A.A. employees named as Defendants in this case, knew or should have known of said conspiracy, retaliation, disparate treatment and harassment, yet, neglected and refused to intercede and prevent same. Defendants are sued in their individual capacities.

**WHEREFORE,** Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits or employment including sick leave, vacation leave and others, plus attorney's fees incurred in pursuing this case, as well

as for defending F.A.A. v Platt before the N.T.S.B., SE 11-708, in the amount of $500,000.00;

B. For compensatory damages for losses resulting from humiliation, mental anguish, and damage to Plaintiff's name, professional reputation and standing, in the amount of $500,000.00;

C. For pre-judgment interest on the amount of lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of $5,000,000.00;

E. That the F.A.A. expunge all negative and derogatory comments or references in any official government files relative to any and all of the facts complained of herein;

F. For costs of this suit, including reasonable attorney's fees;

G. For such other and further relief as the Court may deem proper.

**COUNT III**

CIVIL CONSPIRACY

Plaintiff, Philemon K. Platt, sues J. Ihle and L. Ihle, individually, Scarfeo, Glavin and Bishop, in their individual and official capacities, and the F.A.A., and alleges;

48. The factual allegations contained in paragraphs 1 through and including 47 are incorporated herein by reference as if fully restated herein.

49. The facts alleged in Counts I and II constitute a civil conspiracy under North Carolina Law.

**WHEREFORE,** Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits or employment including sick leave, vacation leave and others, plus attorney's fees incurred in pursuing this case, as well as for defending F.A.A. v Platt before the N.T.S.B., SE 11-708, in the amount of $500,000.00;

B. For compensatory damages for losses resulting from humiliation, mental anguish, and damage to Plaintiff's name, professional reputation and standing, in the amount of $500,000.00;

C. For pre-judgment interest on the amount of lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of $5,000,000.00;

E. For costs of this suit, including reasonable attorney's fees;

F. For such other and further relief as the Court may deem proper.

## COUNT IV

MALICIOUS INTERFERENCE WITH THE RIGHT TO CONDUCT ONE'S BUSINESS

Plaintiff, Philemon K. Platt, sues J. Ihle and L. Ihle, individually, Scarfeo, Glavin and Bishop, in their individual and official capacities, and the F.A.A., and alleges;

50. The factual allegations contained in paragraphs 1 through and including 49 are incorporated herein by reference as if fully restated herein.

51. As a result of the actions of all of the Defendants, the Plaintiff has not been able to operate his charter airline business for a lengthy

period of time; Plaintiff was also forced to expend time and money to defend an action based upon tainted evidence which, if successful, would deprive him of the right to conduct his business as a flight instructor, and commercial pilot.

52. These malicious acts were undertaken by Defendants with the specific intent to deprive Plaintiff of his ability to earn a living and conduct his business as he sees fit; these acts have caused Plaintiff great harm and damage, both pecuniary and otherwise.

**WHEREFORE,** Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits or employment including sick leave, vacation leave and others, plus attorney's fees incurred in pursuing this case, as well

as for defending F.A.A. v Platt before the N.T.S.B., SE 11-708, in the amount of $500,000.00;

B. For compensatory damages for losses resulting from humiliation, mental anguish, and damage to Plaintiff's name, professional reputation and standing, in the amount of $500,000.00;

C. For pre-judgment interest on the amount of lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of $5,000,000.00;

E. For costs of this suit, including reasonable attorney's fees;

F. For such other and further relief as the Court may deem proper.

**COUNT V**

FIFTH AMENDMENT

Plaintiff, Philemon K. Platt, sues Scarfeo, Glavin and Bishop, individually and in their official capacities, the F.A.A., J. Ihle and L. Ihle, and alleges;

53. The factual allegations contained in paragraphs 1 to and including 52 are incorporated herein by reference as if fully restated herein.

54. This claim is for legal and equitable remedies to redress the injuries caused by the F.A.A., its employees and the private citizen Defendants conspiring with them, to Plaintiff by the deprivation of the right to due process secured to Plaintiff by the Fifth Amendment of the United States Constitution and the right to equal protection of the law as all citizens are under the provisions of the United States Constitution.

55. The actions of the F.A.A. in pursuing the

taking of Plaintiff's pilot's licenses based on allegations known to the F.A.A. to be false and based upon evidence known to the F.A.A. to be at best, tainted, and at worst, illegally manufactured, constitutes a deprivation of Plaintiff's right to due process as such right is articulated and guaranteed by the Fifth Amendment of the United States Constitution.

56. The consistent and unrelenting harassment by officials of the F.A.A. of the Plaintiff for a period of over ten years constituting such disparate treatment as to deny Plaintiff equal protection under the laws of the United States.

57. Conspiracy of F.A.A. employees with other non-Federally employed citizens of the United States to deprive Plaintiff of his liberty and his property constitutes a denial of due process by all of

the Defendants named herein.

58. The deprivations of Plaintiff's basic constitutional rights have caused him great harm and damage.

**WHEREFORE,** Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits or employment including sick leave, vacation leave and others, plus attorney's fees incurred in pursuing this case, as well as for defending F.A.A. v Platt before the N.T.S.B., SE 11-708, in the amount of $500,000.00;

B. For compensatory damages for losses resulting from humiliation, mental anguish, and damage to Plaintiff's name, professional reputation and standing, in the amount of $500,000.00;

C. For pre-judgment interest on the amount of

lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of $5,000,000.00;

E. That the F.A.A. expunge all negative and derogatory comments or references in any official government files relative to any and all of the facts complained of herein;

F. For costs of this suit, including reasonable attorney's fees;

G. For such other and further relief as the Court may deem proper.

**COUNT VI**

MALICIOUS INTERFERENCE WITH CONTRACT

Plaintiff, Philemon K. Platt, sues Scarfeo, Glavin and Bishop, in their individual and official capacities, and the F.A.A., and alleges;

59. The factual allegations contained in paragraphs 1 through and including 58 are incorporated herein by reference as if fully restated herein.

60. That when Reynold Bishop was advised by Ms. Mary Bender, one of the owners of Air East at that time, that she had hired Plaintiff as chief pilot and check airman, Bishop maliciously and with intent to interfere with the established contract, advised Mary Bender that Air East would never obtain approval for Plaintiff as either check airman or chief pilot by the F.A.A. Bishop went on to unlawfully disclose that Platt was under investigation, in violation of 18 U.S.C. §1905 and 49 U.S.C. Appx. §1472 (f).

61. Bishop's intimidation worked. Air East backed out of the contract on the day before Plaintiff

was to begin his duties under the employment contract.

62. By losing the contract, Plaintiff suffered great harm and damage, both pecuniary and otherwise.

**WHEREFORE**, Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits or employment including sick leave, vacation leave and others, plus attorney's fees incurred in pursuing this case, as well as for defending F.A.A. v Platt before the N.T.S.B., SE 11-708, in the amount of $500,000.00;

B. For compensatory damages for losses resulting from humiliation, mental anguish, and damage to Plaintiff's name, professional reputation and standing, in the amount of $500,000.00;

C. For pre-judgment interest on the amount of lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of $5,000,000.00;

E. For costs of this suit, including reasonable attorney's fees;

F. For such other and further relief as the Court may deem proper.


_____

Gary Clemmons
Stubbs, Perdue, Chesnutt,
Wheeler & Clemmons
P.O. Drawer 1654
New Bern, NC 28563
(919) 633-2700

_____

Charles B. Zuravin
Charles B. Zuravin, P.A.
11032 Two Ships Court
Columbia, Maryland 21044
(301) 992-4799

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 91-12-CIV-2-BO

PHILMON K. PLATT, )
)
Plaintiff, )
)
ORDER
v. )
)
JUDITH IHLE, *et al.* )
)
Defendants. )

This matter comes before the undersigned United States District Judge for ruling on the pending motions. The Plaintiff has filed a motion for reconsideration of the court's order granting defendants Judith and Linda Ihle's motions to dismiss and a motion to amend the complaint. The Ihle's have filed a motion for sanctions, and on behalf of the Federal Aviation Administration ("F.A.A.") and its employees, the United States Government has filed a

as the party defendant, a motion to strike the claim for punitive damages and a motion to strike the demand for a jury trial. In his response to the government's motion to dismiss, the plaintiff conceded the following: Counts one and two of the amended complaint are inappropriate under the facts presented and thus should be dismissed; the United States should be substituted in lieu of the F.A.A. and all claims against the United States should be dismissed; and the claims against Defendants Scarfeo, Glavin, and Bishop in their official capacities should be dismissed. Accordingly, the only counts of the amended complaint which the court must consider are counts three through five against defendants Judith and Linda Ihle, and counts three through six against defendants Scarfeo, Glavin and Bishop in their individual capacities.

The court need not consider the plaintiff's motion to amend the complaint with respect to the government

because the plaintiff can, as a matter of right, amend the complaint anytime prior to a responsive pleading being filed by the defendant. The plaintiff amended his complaint prior to any response by the government. The motion to dismiss filed by the government addressed both the original complaint and the amended complaint. This situation can be distinguished from the situation in *U.S. Development Corp. v. Peoples Federal Savings & Loan*, 873 F.2d 731 (4th Cir. 1989), in which the Fourth Circuit held that a party has the right to notice and an opportunity to be heard prior to granting summary judgment *sua sponte*. In this case, the defendant had notice of the amended complaint and filed its motion to dismiss addressing both complaints. Further, the plaintiff responded to the government's motion to dismiss. There was adequate notice of the amended complaint to all parties.

Therefore, the court will only consider the plaintiff's motion for reconsideration of the court's previous order allowing the Ihles' motion to dismiss, the plaintiff's motion to amend the complaint against the Ihles, the Ihles' motion for sanctions, and the F.A.A. employees' motions to dismiss.

## STATEMENT OF FACTS

The plaintiff is a professional pilot who operates Pamlico Air Services from his home in Ocracoke, North Carolina. The plaintiff filed his complaint seeking damages against the F.A.A., its employees and two civilians for allegations of harassment, abuse of process and civil conspiracy. The plaintiff contends that the defendants have conspired together to damage the plaintiff and his air taxi business which is based in Ocracoke, North Carolina. The plaintiff contends that he was first subjected to harassment and intimidation by the F.A.A.

while he was in the air charter business in Easton, Maryland. He filed a law suit against the F.A.A. at that time which was settled out-of-court. The gravamen of the complaint at bar is that the F.A.A. and its employees have continued to harass the plaintiff even after he filed suit against the F.A.A. in 1980 to stop the harassment. This conduct by the F.A.A. continued even after the plaintiff moved from Maryland to North Carolina. This harassment has hindered the plaintiff's ability to conduct his business. Further, the F.A.A. has sought to revoke the plaintiff's pilots license which the plaintiff claims is further evidence of harassment.

## CONCLUSIONS OF LAW

1. Plaintiff's Motion for Reconsideration of the Court's Order Granting Linda and Judith Ihles' Motions to Dismiss and the Plaintiff's Motion to Amend the Complaint with Respect to the Ihles.

The plaintiff relies on his Amended Complaint to support his motion for reconsideration. The plaintiff

alleges that the Ihles are properly named defendants in the counts of the amended complaint which allege civil conspiracy, malicious interference with the right to conduct one's business, conspiring with federal officials to deprive plaintiff of his rights to due process under the Fifth Amendment of the United States Constitution, and malicious interference with the right to contract. The court will consider the plaintiff's amended complaint in determining whether to strike its order of May 3, 1991.

In count five, the plaintiff claims that the defendants conspired to deprive him of his due process rights secured to him by the Fifth Amendment of the United States Constitution. The plaintiff cites *Canadian Transport Co. V. United States*, 663 F.2d 1081 (D.C. Cir. 1980) for the proposition that when civilians act in concert with federal agents for federal purposes they are, in effect, federal agents, and can be held liable for a deprivation of

Fifth Amendment due process rights. The D.C. Circuit in *Canadian Transport* actually held that "private citizens, acting in their private capacities, cannot be guilty of violating due process rights. The Fifth Amendment is a restraint on the federal government, not on private citizens." *Id.* at 1093. (footnote omitted). As in *Canadian Transport*, the Ihles were acting in their private capacities not as government agents. The Supreme Court has held that federal officials can be held liable for due process violations while they were acting in their official capacities. *Bivens v. Six Unknown Federal Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and *Davis v. Passman*, 442 U.S. 228 (1979).

The plaintiff fails to present any argument that the Ihles acted in any official capacity to deprive the plaintiff of his due process rights. During their cooperation with the F.A.A. they simply acted in their capacity as private

citizens. Therefore, count five of the amended complaint must fail. If Count Five fails there are no other counts that rest on federal question subject matter jurisdiction. Furthermore, since there is no federal question jurisdiction nor any diversity jurisdiction, the court my decline to exercise its supplemental jurisdiction over state claims over which it has original jurisdiction. 28 U.S.C. §1367. The court finds no significant reason to retain the state claims. Accordingly, the plaintiff's motion for reconsideration of the granting of the Ihles' motions to dismiss is denied.

2. Ihles' Motion for Rule 11 Sanctions.

The Ihles' motion for sanctions claims that the plaintiff's complaints failed to state a claim upon which relief could be granted and was completely frivolous. The plaintiff's *pro se* complaint and amended complaint failed to state a federal claim upon which relief could be

granted. The federal question counts were based on two rules of law which a brief amount of research would have revealed could not be applied to the facts presented against the Ihles in this case. Rule 11 allows for sanctions if a pleading is not warranted by existing law. Accordingly, the Rule 11 sanctions against the plaintiff are allowed with respect to the Ihles. The plaintiff is directed to pay all reasonable expenses of the Ihles incurred in defending this law suit including reasonable attorney's fees.

3. The Government's Motion to Dismiss the Plaintiff's Complaint Against Defendant's Scarfeo, Glavin and Bishop in Their Individual Capacities.

The only counts left in the Amended Complaint are the counts against defendants Scarfeo, Glavin, and Bishop in their individual capacities. Scarfeo, Glavin and Bishop are F.A.A. employees who the plaintiff alleges maliciously interfered with his right to conduct business, maliciously interfered with his right to contract, violated his due

process rights and civilly conspired against the plaintiff to deprive him of his rights under 42 U.S.C. §§ 1985 (3) and 1986.

Individual federal officers can be sued for violations of f the constitutional rights of an individual. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Jurisdiction is allowed against federal officials in their individual capacities only where the conduct alleged rises to the level of a constitutional violation. The plaintiff alleges constitutional violations of his "property" and "liberty" rights by the defendants for conspiring to destroy him professionally, by filing false records in federal files, obtaining and relying on false affidavits to the plaintiff's detriment, retaliating against plaintiff for having brought a successful suit against the F.A.A. ten years ago, depriving him of a certificate to carry passengers for hire in airplanes, causing

him to be fired from a lucrative job for which he had just been hired, violating F.A.A. standards by issuing an emergency revocations of all of plaintiff's pilot licenses and generally taking action against plaintiff so as to make it impossible for him to earn a living in aviation. The plaintiff concludes his pleading by stating " [i]t can hardly be argued that what Plaintiff has suffered at the hands of the defendants does not rise to the level of a 'liberty' or 'property' interest protected by the due process clause of the Fifth Amendment and its equal protection component." The plaintiff makes numerous conclusory statements about the wrongs he suffered at the hands of the defendants, but he fails to allege with specificity any violation of his constitutional rights. The plaintiff must allege facts which, taken as true, demonstrate conduct that all reasonable public officials would know violates a particular constitutional guarantee. *Elliott v. Perez*, 751

F.2d 1472 (5th Cir. 1985). In asserting a constitutional claim against a government official, the plaintiff must allege "with particularity all material facts on which [the plaintiff] contends he will establish his right to recovery, which will include detailed facts supporting the contention that the please of immunity cannot be sustained." *Id.* at 1482.

Accordingly, the plaintiff has not established any conduct by the defendants that rises to the level of constitutional violations. Therefore, the plaintiff's action against the defendants cannot be maintained.

CONCLUSION

For the reasons stated above the court makes the following ruling: the plaintiff's motion for reconsideration of the court's order granting defendants Judith and Linda Ihle's motions to dismiss DENIED; the Ihles motion for sanctions is GRANTED; the motion to dismiss defendants

Scarfeo, Glavin and Bishop is GRANTED. Accordingly, all other motions before the court are moot.

SO ORDERED this 17th day of September, 1991.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

PHILEMON K. PLATT

*Plaintiff-Appellant.*

v. No. 91-2258

JUDITH IHLE; LINDA IHLE; AND FEDERAL AVIATION ADMINISTRATION, et al.

*Defendants-Appellees.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Terrence W. Boyle, District Judge. (CA-91-12-CIV-2-BO)

Argued: March 2, 1992

Decided: June 22, 1993

Before WIDENER and LUTTIG, Circuit Judges, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

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Affirmed by unpublished per curiam opinion.

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## COUNSEL

**ARGUED:** Charles Barry Zuravin, Columbia, Maryland, for Appellant Steven Ellsworth Lacy, New Bern, North Carolina; Linda Kaye Teal, Assistant United States Attorney, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Margaret Person Currin, United States Attorney, Raleigh, North Carolina, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

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## OPINION

PER CURIAM:

Philemon K. Platt appeals from an order of the United States District Court for the Eastern District

of North Carolina dismissing his action brought under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and imposing sanctions in favor of two defendants pursuant to Fed. R. Civ. P. 11. We agree the Platt has failed to state a claim under the *Bivens* doctrine, and we find that the district court did not abuse its discretion in imposing costs and attorney's fees as to the claims against the private defendants, the Ihles. Accordingly, we affirm.

The relevant facts alleged in Platt's amended complaint, which we assume as true for present purposes, are as follows. Appellant Platt is a professional airman who, prior to the events giving rise to this suit, held several types of pilot's licenses, including a commercial pilot's license and an air taxi/charter operator's license. In 1988 Platt moved

to Ocracoke, North Carolina, where he intended to pursue his career in the aviation field. In addition to forming his own air taxi business in Ocracoke, in October, 1989, Platt accepted a position as chief pilot and check airman with Air East, a small airline operating out of New Bern, North Carolina. Air East had been having trouble obtaining certain Federal Aviation Administration (FAA) approvals necessary to operate as an airline, and Platt was hired in part for his expertise in obtaining the needed approvals.

However, when the owners of Air East informed Reynold Bishop, an FAA employee based in Winston-Salem, North Carolina, that they had hired Platt, Bishop gave them the impression that Platt was not a competent airman and that they would be unable to conduct their business with him on board. Bishop informed them that "he and the F.A.A. would

never give Phil Platt the necessary authorization needed by a chief pilot or check airman," that Platt "had given the Baltimore office [of the FAA] a hard time,"[1] and that Platt was the subject of an ongoing FAA investigation. Allegedly as a result of Bishop's negative statements, Air East fired Platt the night before he was to begin work.

Platt encountered further difficulties with the FAA after the Air East episode, this time in connection with his activities as a pilot and air taxi operator. The airport at Ocracoke is owned by the United States Park Service and does not allow

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[1]Between 1977 and 1988 Platt owned and operated an air charter business in Easton, Maryland. During those years Platt experienced a turbulent relationship with the Baltimore Office of the FAA. That poor relationship culminated in Platt's filing suit against the FAA in federal court in 1981. The lawsuit was settled favorably to Platt, a fact which, he alleges, caused FAA officials to bear a grudge against him from that point forward.

commercial aviation operations to be based on that airfield. Though Platt disputes the scope of the prohibition on commercial operations, he apparently agrees that traditional charter flights may not be conducted from the Ocracoke airport.[2] In any

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[2] As we describe more fully below, the FAA revoked Platt's license on the grounds that he had violated the prohibition on commercial flights out of Ocracoke by flying persons from Ocracoke to the mainland in exchange for money. Platt does not dispute that those flights occurred or that he was compensated for them. Rather, his argument appears to be that the flights were not prohibited commercial flights because they were not "charter" flights, meaning that his passengers did not pay him for performing the service of flying them in his airplane to their destinations. He instead characterizes these flights as rentals of the airplane itself, combined with his gratuitous service as pilot. On this distinction he bases his claims against the Ihles.

On its face this characterization may seem to be nothing more than a ruse to evade the restrictions on commercial flights from Ocracoke airport. However, we need not delve into the merits of this distinction under the complex body of aviation law, as our disposition of this *Bivens* action for damages

event, the FAA, believing that Platt had violated federal regulations by conducting charter flights to and from Ocracoke airport, took steps to revoke Platt's pilot's licenses on February 5, 1991. The FAA's order revoking those licenses presently is on appeal before the National Transportation Safety Board (NTSB).

The bulk of Platt's claims arise out of events leading to the revocation of his licenses. First, though the record does not reveal the exact date, at some point during 1989 Platt flew an official of Hyde County, North Carolina, from Swan Corner, North Carolina, to Ocracoke. That flight apparently was arranged Linda Ihle, a private citizen and resident of

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does not depend on the legality of the flights in question or the propriety of the revocation of Platt's licenses. We instead leave these matters to the expertise of the F.A.A. and the N.T.S.B.

Ocracoke. Upon completion of the flight, Linda[3] offered to pay Platt for his services. Platt initially refused to accept the payment because he had a contractual arrangement with Hyde County whereby he would lease his airplanes to county officials at county expense when needed for official travel. Ultimately, however, Platt accepted Linda's check in compensation for transporting the official. Sometime thereafter, Linda Ihle filed a report with the FAA recounting her arrangement of that flight and her payment to Platt.

The second incident leading to the revocation of Platt's licenses involved Linda Ihle's mother, Judith. On May 10, 1989, Platt flew Mrs. Elizabeth O. Howard from Ocracoke to New Bern and back in

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[3]. For purposes of clarity, we refer to the private defendants in this case, the Ihles, by their first names.

exchange for an unspecified amount of money. During June 1989, Judith apparently learned of this flight and so informed FAA officials Edward F. Glavin and Dennis Scarfeo. Glavin then prepared a statement or "interview" report to be signed by Mrs. Howard recounting her paid flight with Platt. Judith Ihle then took this statement to Mrs. Howard, who signed it. On the strength of these reports regarding these flights, the FAA moved to revoke Platt's licenses.

On May 8, 1991, Platt filed a *pro se* complaint in the district court against Judith and Linda Ihle and FAA employees Bishop, Glavin and Scarfeo[4] claiming, on various legal theories including state tort

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[4]. The original complaint also named the FAA itself and the FAA employees in their official capacities. Platt later consented to the dismissals of these claims.

law and 42 U.S.C. § 1983, that the defendants had conspired to fabricate FAA charges against him in an effort to damage his reputation and close his air taxi business. On May 3, 1992, the court granted Judith and Linda Ihle's motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6). On May, 10, 1991, the Ihles moved the court for Fed. R. Civ. P. 11 sanctions against Platt. Before the court ruled on the sanctions motion and before the other Defendants responded to the complaint, Platt, now through counsel, filed an amended complaint against all of the defendants, including the Ihles. This Complaint essentially repeated the factual allegations of the original complaint but added claims under *Bivens, supra,* against all defendants. As the Ihles had already been dismissed from the case, Platt sought to have them reinstated by naming them in the

amended complaint and filing a motion for reconsideration of their prior dismissal. The government, acting on behalf of the FAA defendants, moved to dismiss the complaint as against Bishop, Glavin and Scarfeo.

The district court, by order dated September 17, 1991, granted the motion to dismiss defendants Bishop, Glavin and Scarfeo, denied Platt's motion to reconsider the Ihles dismissal, and awarded Rule 11 sanctions in favor of the Ihles. As to the claims against Bishop, Glavin and Scarfeo, the court held that Platt failed to allege any specific facts which would support a finding that they had violated Platt's constitutional rights or that they would not be shielded from liability by the doctrine of qualified immunity. As to the Ihles the court held that the amended complaint failed to allege with sufficient

specificity that they acted in concert with the FAA defendants so that, even if a *Bivens* claim may lie against private individuals in narrow circumstances, Platt had failed to state a claim against them. Further, the court found the claims against the Ihles so insubstantial as to be frivolous and directed Platt to pay the Ihles' reasonable expenses incurred in defending the suit, including reasonable attorney's fees. Finally, having disposed of the only remaining federal claim in the suit, the court declined to exercise pendent jurisdiction over Platt's state law claim.[5]

Being in substantial agreement with the

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[5]. Platt does not appeal the dismissal of the state claims or his other federal claims; thus, the only issues remaining in this case for our consideration are the *Bivens* claims against the FAA employees in their individual capacities and the Ihles, as well as the sanctions award against Platt.

reasoning of the district court, we shall elaborate on its opinion only briefly, largely to take note of two recent decisions of the United States Supreme Court that only bolster the district court's conclusions. For purpose of analysis Platt's *Bivens* claims can be divided into three categories: 1) the claims against the Ihles for their participation in gathering information regarding Platt's allegedly illegal commercial flights; 2) the claim against FAA employee Bishop for his alleged defamatory statements to Air East; and 3) the claims against Bishop, Glavin, and Scarfeo for their alleged fabrication of FAA violations leading to the revocation of Platt's pilot's licenses. We address each category in turn.

We need not address the question of whether *Bivens* type action may have maintained against

private citizens in certain circumstances, Platt has failed to allege with even minimal specificity any concerted action on the part of the Ihles with the FAA in this case. The amended complaint does not allege any specific facts which, if proved, would establish that the Ihles conspired with the FAA to violate Platt's due process rights. Without its conclusory pleading and unnecessary adjectives and adverbs, Platt's complaint alleges only that the Ihles reported the facts of two incidents, Platt's compensated flights of a Hyde County and of Mrs. Howard, the occurrence of which Platt does not dispute. As we have described, see note 2, *supra*, Platt only disputes the legal significance of these reports, a matter of which, as we shall see, is for resolution by the proper federal agencies. His quarrel with the Ihles, then, is only that they brought the

occurrence of those flights to the attention of the FAA. We are of the opinion that a private citizen's relation of truthful information to a federal regulatory agency does not give rise to a claim for damages against that citizen even though that agency's use of that factual information may be legally insupportable or even tortious.

Accordingly, we concur with the district court's denial of Platt's motion seeking reinstatement of the Ihles as defendants. In light of our agreement with the court's disposition of the claims against the Ihles, we cannot say that the court abused its discretion in awarding costs and attorney's fees to the Ihles under Rule 11. See *Cooter & Gell v. Hatman's Corp.* 496 U.S. 384, 399-405 (1990).

As for Platt's second type of claim, that FAA

employee Bishop's alleged defamatory [6]statements to Platt's prospective employer, Air East, led to his termination, we are of the opinion that the recent decision in *Siegert v. Gilley*, 59 U.S.L.W. 4465 (U.S. 1991), largely removes such claims from the realm of injuries redressable through a *Bivens* cause of action. *Siegert* was a clinical psychologist who had been employed by the federal government at St. Elizabeths Hospital in Washington, D.C. He resigned from that post to avoid imminent termination on grounds of alleged excessive absences and general poor performance. He then began working as a

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[6] At oral argument Platt's counsel insisted that Bishop's statements were not defamatory, presumably in an attempt to avoid the holding in the *Siegert* case, as we describe below. We think the clear implication of Bishop's words, however, at least was the Platt was incompetent and thus would be a detriment to Air East's operations. Thus, the only fair characterization of this claim is one for defamation.

civilian clinical psychologist at the United States Army Hospital in Bremerhaven, West Germany. The government requires that such personnel be "credentialed," and as part of the credentialing process Siegert requested that his previous supervisor at St. Elizabeths Hospital, one Gilley, provide the Army with information on his job performance and privileges while a member of their staff. In response Gilley provided the Army with an exceedingly negative report of Siegert's performance and qualifications, causing Siegert ultimately to lose his position with the Army.

Siegert sued Gilley for damages under *Bivens*, claiming that the report was false and defamatory and thus that Gilley's actions deprived Siegert of his "liberty" interest in his job without due process of law in violation of the Fifth Amendment to the

United States Constitution. The Court rejected this contention and held that Siegert had "failed to satisfy the first inquiry in the examination of such a [*Bivens*] claim; he failed to allege the violation of a clearly established constitutional right." *Siegert,* 59 U.S.L.W. at 4467. According to the Court, damage to one's reputation due to the defamatory statements of a federal official does not constitute a deprivation of "liberty" within the meaning of the Fifth Amendment even if that damage to reputation leads to more concrete economic harm. To quote the Court:

> Defamation by itself, is a tort actionable under the laws of most States, but it is not a constitutional deprivation
>
> ...

The statements contained in the letter would undoubtedly damage the reputation of one in [Siegert's] position, and impair his future employment prospects. But the plaintiff in *Paul v. Davis* [, 424 U.S. 693 (1976)] similarly alleged serious impairment of his future employment opportunities as well as other harm. Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation it may be recoverable under state tort law but is not recoverable in *Bivens* action.

*Siegert*, 59 U.S.L.W. at 4467-68. We are of the opinion that Platt's claim against Bishop fall squarely within the holding in *Siegert,* and thus we affirm the district court's dismissal of the claim related to his statements to Air East.

Finally we address the remainder of Platt's claims against the FAA employee defendants, all of which relate to the allegedly wrongful revocation of his pilot's licenses. The regulations of the FAA and NTSB set out a comprehensive procedure whereby a pilot having suffered the revocation of his licenses may challenge the propriety of the revocation before those agencies and ultimately, before the federal courts. See generally 49 U.S.C. App. §§ 1429, 1486; 14 C.F.R. Part 13 (1992) (FAA proceedings); 49 C.F.R. Part 821 (NTSB proceedings). As we have noted, Platt indeed has availed himself of these

procedures and, at the time of filing the complaint in this case had an administrative appeal pending before the NTSB.

These statutory and administrative procedures ultimately will determine whether the FAA in general, and Bishop, Gavin and Scarfeo in particular, acted lawfully in revoking Platt's licenses. Certainly those highly specialized agencies are uniquely qualified to deal with what may prove to be complex issues of federal aviation law. In *Schweiker v. Chilicky,* 487 U.S. 412 (1988), the Court recently made it clear that the existence of such comprehensive remedial scheme precludes an injured person from bringing a *Bivens* damages action against the alleged wrongdoers. We think the FAA and NTSB procedures noted above are precisely the type of remedial scheme that obviates the need for the

*Bivens* cause of action in light of *Chilicky*, and accordingly we affirm the district court's dismissal of all of Platt's claims in this case growing out of the revocation of his licenses.

For the foregoing reasons, the judgment of the district court is

**AFFIRMED**